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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5236 OF 2005

Milind Dattatreya Sugavkar)
Age : 42 years, advocate, High)
Court, Mumbai R/o. 011, Shri Sai)
Niketan CHS Ltd., CTS No.236,)
Plot No.9, S.V.P. Road, Ground)
Floor, Survey No.22, Borivali)
(West), Mumbai - 400 103.) ... Petitioner

Versus

1. Municipal Corporation of)
Greater Mumbai,)
Mahapalika Bhavan, Mahapalika)
Marg, Mumbai - 400 001.)

2. Shri Mangesh Shripad Sanzgiri)
of Shri Saniketan CHS Ltd.,)
Madonna Colony, S.V.P. Road,)
CTS No.236, Plot No.9, Hissa)
No.2, Survey No.22, Borivali)
(West), Mumbai - 400 103.) ... Respondents

Mr. M.D. Sugavkar, petitioner-in-person.

Mr. A.J. Bhor for respondent 1.

Mr. L.C. Joshi for respondent 2.

CORAM: SMT. RANJANA DESAI, J.

DATED: 21ST SEPTEMBER, 2005.

ORAL JUDGMENT:-

1. Rule. Rule made returnable forthwith by consent of the parties.

2. The petitioner is the original plaintiff. He is a practicing advocate. He is appearing in person. Respondent 1 is the Municipal Corporation of Greater

Mumbai (for short "the Corporation"). Respondent 2 is one Mangesh Shripad Sanzagiri, who is the Secretary of Shri Sai Niketan Co-operative Housing Society Limited (for short, "the said society") situated in CTS No.236, Plot No.9, S.V.P. Road, Ground floor, Survey No.22, Borivali (West), Mumbai - 400 103.

3. The facts which are necessary to understand the controversy may be shortly stated as under:

The petitioner's brother is the member of the said society. Flat No.1 on the ground floor of the said society stands in his name. The Corporation issued a notice under section 351 of the Bombay Municipal Corporation Act (for short, "the said Act") calling upon the petitioner to demolish the alleged unauthorised structure being front portion of hall, admeasuring 12x4x9.6, ground floor of Flat No.1, Shri Sai Niketan CHS Ltd., CTS No.236, Hissa No.2, Plot No.9, Survey No.22, Madonna Colony, S.V.P. Road, Borivali (West), Mumbai - 400 103.

4. It is the petitioner's case that the alleged unauthorised structure is not constructed either by him or by his brother or the members of his family. The said flat was purchased by the petitioner from one Mr. Tagare in the year 2003. The alleged unauthorised construction was there even when the flat was purchased by the petitioner and his family. According to the petitioner,

the said notice was issued by the Corporation at the instance of respondent 2. It is his further case that respondent 2 has also carried out some unauthorised construction. It is basically on these allegations that the petitioner filed L.C. Suit No.2162 of 2005 in the City Civil Court at Mumbai challenging the said notice and praying for an order of injunction restraining the Corporation from demolishing the said structure. In that suit, a chamber summons was taken out by the said society praying that it may be added as party defendant in the suit. That chamber summons was granted by the trial court. Being aggrieved by the said order, the petitioner has approached this court.

5. I have heard the petitioner at length. The petitioner reiterated that neither he nor any member of his family has carried out any unauthorised construction. The alleged construction was already there when the flat was purchased from Mr. Tagare in the year 2003. The petitioner drew my attention to the letter dated 29/6/1994 addressed by the secretary of the said society to the previous owner of the said flat Mr. Tagare, which refers to the application dated 29/6/1994 of Mr. Tagare and states that it was decided in the General Body Meeting of the said society that the said society has no objection to members constructing an otla/varandha on ground level provided the construction is as per prevailing building bye laws conforming to development control rules of the Corporation. The petitioner also

drew my attention to the minutes of the Managing Committee meting held on 15/6/1994. Third item on the agenda is "Proposal by ground floor residents for constructing of balconies/varandah." The petitioner pointed out Resolution No.3 which reads thus:

> "(a) Permission for constructing of balconies would be given by the society subject to approval of the legitimate authority.
>
> (b) Application for approval be submitted individually to the society giving details of the plan for construction.
>
> (c) Finally, appropriate compensation to be given to society "to be decided in the next meeting"."

The petitioner contended that, it is therefore, obvious that the said society has granted no objection to Mr. Tagare in respect of construction of balconies subject to approval of the legitimate authority. According to the petitioner, therefore, the society has lost its right to object to the said construction. He contended that under section 115 of the Evidence Act, the society is estopped from contending to the contrary. The petitioner reiterated that, it is at the instance of respondent 2 that the chamber summons was taken out. He submitted

that in the suit, no reliefs are claimed against the said society and, therefore, the said society is neither a necessary party nor a proper party. The society has no locus and, therefore, it cannot be impleaded as party defendant. The petitioner further drew my attention to the report of the committee members of the said society dated 13/7/2005. Annexed thereto is the letter from S. Kamath & Associates, Chartered Accountants, which states that conveyance of the building is not executed in favour of the society. The petitioner contended that since the property is still not conveyed to the society, the society is not the owner and, therefore, the society cannot be impleaded in the suit. The petitioner has placed heavy reliance on the judgment of the Supreme Court in **Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and others, (1992) SCC 524.**

6. I have also heard the learned counsel for the respondents. The learned counsel for the society submitted that the society is a necessary party as in the absence of the society the issues involved in the suit cannot be properly decided. The society is in possession of the entire record on the basis of which the court can properly decide the issues involved in the suit. The trial court was, therefore, right in granting the chamber summons. The learned counsel relied on the judgment of the Supreme Court in **Aliji Momonji & Co. v. Lalji Mavji & Ors., (1996) 5 SCC 379**, and the judgments of this court in **Kantaben Chandulal Kalidas v. Parsi Dairy Farm &**

Ors., 1985 Mh.L.J. 220; Adam A. Sorathia & Anr. v. Municipal Corporation of Greater Bombay & Another, 2002(4) Bom.C.R. 419 and Chandrakant Dharma Bhonu v. Pandurang Ramchandra Dandekar & Anr., AIR 2004 Bom. 374.

7. In order to ascertain whether the society should be impleaded as party or not, it is necessary to see how Order 1 Rule 10 of the Code of Civil Procedure (for short, "the Code") has been interpreted by the Supreme Court.

8. I will first refer **Ramesh Kundanmal's case (supra)** on which reliance is placed by the petitioner. In that case, under the dealership agreement, the appellant was in possession of the service station erected on the land held by respondent 2 HPL Corporation Limited as licensee. Respondent 2 therein i.e. the Corporation issued notice under section 351 of the said Act to the appellant for demolition of two chattels on the terrace on the ground that they were unauthorizedly constructed. The appellant filed suit against the Corporation challenging the validity of the said notice and for injunction. Respondent 2 - HPL Corporation Limited applied for being impleaded a party on the ground that they were having material to show that the construction was unauthorised and they are necessary parties to the suit. The trial court allowed the application. The High Court dismissed the writ petition. The matter reached the Supreme Court. The Supreme Court considered the scope of Order 1 Rule 10

of the Code. The Supreme Court held that sub-rule (2) of Rule 10 gives a wide discretion to the court to meet every case of defect of parties and is not affected by the inaction of the plaintiff to bring the necessary parties on record. It is further observed that the question of impleadment of a party has to be decided on the touchstone of Order 1 Rule 10 which provides that only a necessary or a proper party may be added. The Supreme Court defined necessary party as a party without whom no order can be made effectively and proper party as a party in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. The following observations of the Supreme Court must be quoted because the petitioner has placed heavy reliance on them.

> "The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reasons which makes it necessary to make a person a party to an action is so that he

> should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer i.e. he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights."

The Supreme Court applied these principles to the facts before it and observed that the notice does not relate to the service station erected by respondent 2, but it is in relation to two chattels stated to have been erected by the appellant unauthorisedly. The chattels are moveables on wheels and plates, where servicing and/or repairs are done and used for storing implements of the machines and respondent 2 had no interest in these chattels and the demolition of the same in pursuance to the notice is not a matter which affects the legal rights of the respondent. The Supreme Court concluded by saying that since respondent 2 had no direct interest in the subject matter of the litigation, the addition of respondent 2 would result in causing prejudice to the appellant and

substitution of the new cause of action would widen the issue which is required to be settled. The Supreme Court also observed that there was no case of collusion between the appellant and the Corporation. The Supreme Court, in the circumstances, held that the courts below were wrong in holding that the respondent was a necessary party.

9. The petitioner contended that the instant case presents identical fact situation because even here there is no case of collusion between the petitioner and the Corporation and the society has no direct interest in the subject matter of the litigation as no relief is claimed against it. I am unable to agree with the petitioner. In **Ramesh Kundanmal's case (supra)**, the Supreme Court had before it two chattels in which respondent 2, the lessee had no interest. It can never be said that the society would not have interest in removing the unauthorised construction which according to the society is carried out in the compulsory open space. If it is allowed to stand the society may be embroiled in some other litigation. The said alleged unauthorised structure may also lead to F.S.I. violations. The impact of the said notice is on the society's property. In this case, the society is a necessary party not merely because it claims to have the necessary record or evidence, but because, the society will be bound by the order which will be passed by the court and, therefore, its presence will be necessary to effectually and completely settle the issues involved. The society is bound to be affected by any

order passed in the suit. The society certainly has direct interest in the property, particularly in the common open space where according to the society, the unauthorised construction stands. The facts of this case, therefore, materially differ from the facts in **Ramesh Kundanmal's case (supra)**.

10. In this connection, it will be useful to refer to **Aliji Momonji's case (supra)**. The appellant therein had filed a suit for perpetual injunction against the Corporation restraining it from demolishing the portion of the building. The Corporation had issued notice under section 351 of the said Act for demolition on the ground that the appellant had made unauthorised structure. Respondents 2 to 6 who were the landlords, sought to come on record under Order 1, Rule 10 of the Code contending that they have direct interest in the property. The trial court ordered their impleadment. The High Court upheld the order and the matter reached the Supreme Court. The Supreme Court observed that the landlord has direct and substantial interest in the demised building before the demolition of which notice under section 351 was issued. It was observed that in the event of its demolition, the landlords' rights would be materially affected. His right, title and interest in the property demised to the tenant or licensee would be in jeopardy. It was further observed that it may be that the construction which was sought to be demolished by the Corporation was made with or without the consent of the

landlord or the lessor. But the demolition would undoubtedly materially affect the right, title and interest in the property of the landlord. Under those circumstances, the landlord necessarily is a proper party, though the relief is sought for against the Corporation for perpetual injunction restraining the Corporation from demolishing the building. The attention of the court was also drawn to **Ramesh Kundanmal's case (supra)**. The Supreme Court distinguished the said judgment by observing that there the notice did not relate to the structure but two chattels and that the original lessee, the landlord had no direct interest in the property. In my opinion, the ratio of this case is clearly attracted to the facts of the present case.

11. It was urged by the petitioner that the judgment in **Aliji Momonji's case (supra),** is not applicable to the present case because here conveyance is not executed and, therefore, the society cannot be called the landlord. I am unable to agree with the learned counsel for the simple reason that though conveyance is not executed, the society has an equitable right to get the conveyance executed in its favour. Therefore, merely because as of today, conveyance is not executed, the society cannot be side-tracked. I may also refer to the judgment of this court in **Kantaben Chandulal Kalidas's case (supra)** where this court was concerned with a suit for injunction by tenant against the Corporation on receipt of notice issued under sections 351 of the said Act. The question

was whether the owner of the suit premises should be added as a proper party. The following observations of this court may be quoted.

> "Order 1, Rule 10(2) gives ample power to court to direct joinder of parties. Such a joinder against the will of the plaintiff is not ordered but if necessary in interest of justice the same can nonetheless be directed. The owner of a property with regard to which an injunction suit of the present type is filed could be impleaded as a proper party upon the application of such owner notwithstanding the fact that the suit was for injunction against the Municipal Corporation. A party seeking joinder as a proper party will have to prima facie establish that such a party has an interest in the subject matter of the litigation and as such should be before the court. The simple test in such controversy would be as to whether the presence of such a party is appropriate in view of the subject matter in adjudication. If the answer be in the affirmative joinder can be permitted. By reason of direct interest in the subject matter or even by reason of eventual relief sought, such test would be answered. It is not compulsive under the

rule to show always that the presence of the parties applying to be joined is necessary for the determination of the question as between the parties already on the record. The rule is clearly enabling and the court under it can permit addition even of those whose presence appears appropriate in view of the final determination likely to be made of the question that arose between the parties on record. The notices issued by the Municipal Corporation addressed to the tenant touched the property of the applicant. The impact of the notice was not merely upon the persons but in substance and truly upon the property. As the property belonged with all reversionary rights of possession to the real owner, it could not be doubted that the applicant had an interest even in such a suit where the question of authorised or unauthorised construction was in issue. In any event such a person being the owner and being entitled to maintain identity of the property free from damage would have clear entitlement to be impleaded as a proper party. Such a person can well assist the process of adjudication which would involve the question as to whether a particular

construction was or was not authorised within the meaning of the Bombay Municipal Corporation Act."

12. In **Adam A. Sarathia's case (supra)**, the learned single judge of this court was again concerned with the same question. It was the suit by the tenant challenging the notice under section 351 of the said Act. The owner and landlord had applied to be added as parties. Impleadment was rejected by the trial court. This court referred to the judgment in **Ramesh Kundanmal's case (supra)** and in **Aliji Momonji's case (supra)** and held that the landlords are owners and they are proper parties.

13. In **Chandrakant Dharma Bhonu's case (supra)**, same view is reiterated by a learned single judge of this court. It is held that undoubtedly the plaintiff is dominus litus. However, having regard to the provisions of Order 1 Rule 10 of the Code, it cannot be said that the application for impleadment that was moved by the petitioner landlord therein was misconceived.

14. The above judgments make it evident that sub-rule 2 of Order 1, Rule 10, empowers the court to strike out or add parties. This power can be exercised at any stage of the proceedings. A party to the proceedings may persuade the court to act under this provision. But the court may also act suo motu. There are no fetters on the powers of the court to act upon an application made by a third

party. Therefore, the power conferred on the court is wide and, hence, has to be exercised carefully. The court can strike out a party who is improperly joined and add the name of the person who ought to have been properly joined. The person who can be ordered to be joined must be a person who ought to have been joined or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. This provision is obviously aimed at ensuring that the proceedings proceed in the right direction by including in the proceedings parties who have interest in the subject matter of the litigation, who are likely to be affected by the decision of the court and who are bound by the said decision. It also seeks to leave out those whose presence is not necessary so that such persons are not unnecessarily dragged in the proceedings and the proceedings do not become unwieldy. It is true that the plaintiff is dominus litus. But sometimes, in the interest of justice impleadment may have to be ordered even though the plaintiff is not in its favour.

15. In view of the above, I am of the opinion that the trial court cannot be faulted for having impleaded the society as a party to the suit. Hence, the petition is rejected. I, however, make it clear that all contentions of both sides are kept open.

16. At this stage, the petitioner requests that the

impugned order be stayed. The learned counsel for the respondent strongly objects. However, in the facts and circumstances of the case, the impugned order is stayed for a period of eight weeks from today.

(SMT. RANJANA DESAI, J.)